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Interpreting Tort Law

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INTERPRETING TORT LAW

EMILY SHERWIN*

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In their writings on civil recourse, John Goldberg and Benjamin Zipursky present a fresh and carefully reasoned interpretation of tort law.¹ Tort law, they maintain, is a response to *wrongs* rather than losses. It offers victims of wrongdoing a private right of recourse against those responsible for the wrongs done to them, on account of those wrongs.

This is an attractive interpretive theory. It has the advantage of pairing tort law with the intuitively and linguistically related idea of wrongdoing. It also explains a wide variety of tort rules and provides a worthy rival to theories based on corrective justice. Ultimately, however, it does not justify tort law.

In this Article, I begin with a description of civil recourse theory and then turn to the nature and justification of private recourse for wrongs. Goldberg and Zipursky concede that civil recourse draws on the sentiment of resentment that victims feel against those who have injured them, but they maintain that civil recourse is something more than a controlled alternative to private revenge. A victim seeking recourse for an injury is responding to the injurer's violation of a norm of conduct: the victim is enforcing a *right* against wrongful injury and a correlative *duty* of the wrongdoer. The state, in turn, is obligated to recognize the victim's right and enforce the wrongdoer's duty, as a matter of fairness and equal treatment of citizens. Language of entitlement, however, does not alter the fact that what the victim is entitled to is a form of revenge: civil recourse enables victims to visit harm on wrongdoers in response to wrongs. Viewed this way, a field of law based on civil recourse requires justification on independent grounds.

Next, I take up a different, although perhaps related, set of questions about the project of interpreting a field of law. As I understand it, interpreting a field of law means constructing the most attractive

* Professor, Cornell Law School. Thanks to Larry Alexander, Kevin Clermont, and Bradley Wendel for helpful comments.

1. Goldberg and Zipursky have developed civil recourse theory in a number of writings, most notably John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917 (2010) [hereinafter Goldberg & Zipursky, *Torts as Wrongs*], and John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123 (2007) [hereinafter Goldberg & Zipursky, *Moral Luck*].

theory or principle capable of explaining most of the structural and substantive features that mark a conventionally recognized category of law. Although I admire the skillful interpretive work that Goldberg and Zipursky have done, I am not persuaded that the interpretive method provides a reason to believe that the resulting principle is either descriptively true or normatively desirable.

I. CIVIL RECOURSE

Civil recourse theory rests on a wrong-based interpretation of tort law: tort law gives individual victims of wrongdoing a right of action and a set of remedies against the individuals who wronged them.² This understanding of tort law stands in contrast to a number of prominent theories that focus on allocation of losses, particularly on allocation of accidental losses. Economic theories explain tort law as reducing the costs of accidents, usually by forcing actors to internalize losses that result from inefficient behavior or by shifting losses to the parties best able to avoid them or insure against them.³ Corrective justice theories hold that tort law enforces a moral duty of wrongdoers to compensate for losses caused to the victims of their wrongs.⁴

Goldberg and Zipursky rightly conclude that tort theories based on allocation or rectification of losses are not ideally fitted to tort doctrine.⁵ Tort law responds to facts about agency and intention as well as facts about loss.⁶ Tort remedies are not tightly linked to compensation of losses: monetary awards to tort victims are sometimes undercompensatory,⁷ sometimes overcompensatory,⁸ and sometimes hard

2. Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 1, at 918; Goldberg & Zipursky, *Moral Luck*, *supra* note 1, at 1123-24.

3. See, e.g., GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970) (explaining tort law as a means of reducing accident costs); see also WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987) (offering a positive analysis of tort law as a means of encouraging efficient precautions against harm).

4. See, e.g., JULES L. COLEMAN, *RISKS AND WRONGS* 303-27 (1991) (offering a "mixed conception" of corrective justice in which wrongdoers have a duty to correct the consequences of their wrongs); ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* 48-93 (1999) (explaining negligence law in terms of correction of unfair divisions of risk); Stephen R. Perry, *On the Relationship Between Corrective and Distributive Justice*, in *OXFORD ESSAYS IN JURISPRUDENCE* 237, 237-63 (Jeremy Horder ed., 2000) (defending a loss-based corrective justice theory); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 *IOWA L. REV.* 449, 496-514 (1992) (defending a "volitionist/distributive" theory of fault-based liability for loss).

5. See Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 1, at 978-80.

6. See *id.* at 966-71 (discussing agency-related tort doctrines).

7. Examples include the "economic loss rule," other limits on consequential damages, and the "American rule" for attorney's fees, which requires successful plaintiffs to pay their own litigation costs and governs most ordinary tort suits. See Emily Sherwin, *Compensation and Revenge*, 40 *SAN DIEGO L. REV.* 1387, 1390-92, 1395 (2003) (discussing limits on compensatory remedies). To the extent that mismatches between loss and remedy reflect administrative concerns, they do not undermine the claim that tort law is primarily concerned with loss. But ease of calculation and worries about excessive numbers of claims

to explain even roughly in terms of compensation.⁹ Tort victims are sometimes entitled to sue and recover without proof of loss.¹⁰ Courts also grant injunctions, gain-based restitution, and punitive damages in response to tortious wrongdoing.¹¹ And, even if we assume that fair allocation of losses is a significant goal of the legal system, tort law may not be the best means of accomplishing that goal.¹²

An alternative theory based on wrongs must begin with an account of wrongdoing. Goldberg and Zipursky propose that tortious wrongdoing is defined by law rather than morality: the wrongful character of an act depends on rules with appropriate legal provenance.¹³ In the domain of tort, several characteristics distinguish legal wrongs from moral wrongs. First, an act is not wrongful, for tort purposes, unless it is “realized” in an injury.¹⁴ The outcomes of actions may or may not count in morality, but they must count in tort law because tort law is relational: it enables individual victims to recover from individual wrongdoers based on wrongs done by the wrongdoer to the victim. Without injury, no one is a victim and no one can sensibly assert a right to recourse. Similarly, on the wrongdoer’s side, the duty enforced by tort law is a duty against mistreat-

do not explain all the ways in which tort recovery departs from the goal of compensation.

8. Examples include the collateral source rule, other rules limiting credits for offsetting benefits resulting from a wrong, and traditional rules excluding evidence of taxes a personal injury victim would have paid on lost future income. *See id.* at 1391-92, 1395 (describing remedial rules).

9. This is at least arguably true of nonpecuniary harm such as pain and suffering. *See generally* DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES* 166-71 (4th ed. 2010) (discussing valuation in cases of personal injury and death).

10. Goldberg and Zipursky cite the examples of trespass and conversion, which allow property owners to recover for loss of the right of use without proof that they would have used the property themselves, or were otherwise harmed by an intrusion or appropriation. Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 1, at 954-55. In cases of false imprisonment or harm to dignitary interests, damages are presumed and juries are left to award what they find to be appropriate. *See id.* at 955; LAYCOCK, *supra* note 9, at 187. In cases involving breach of fiduciary duty, arguably a species of tort, the principal can claim restitution without proof of loss. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43 cmt. B (Tentative Draft No. 4, 2005).

11. *See* Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 1, at 960-63. Injunctions can be characterized as a response to loss, seeking either to prevent losses from occurring or to limit the losses that follow from a wrong. *See* LAYCOCK, *supra* note 9, at 297-98. Punitive damages, although most often justified on grounds of deterrence and retribution, must bear a proportional relation to loss. *See* *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). Restitution, however, is a claim to the wrongdoer’s gains, independent of the claimant’s loss.

12. *See* LANDES & POSNER, *supra* note 3, at 57-58 (noting administrative costs of tort law); Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 1, at 978-80 (noting failings of tort law as a system of loss allocation); Christopher H. Schroeder, *Corrective Justice, Liability for Risks, and Tort Law*, 38 UCLA L. REV. 143 (1990) (arguing that corrective justice can be accomplished through a risk-pooling system).

13. Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 1, at 930-31, 947-53.

14. *See id.* at 934-36, 941-45 (defending an “injury-inclusive” conception of wrongs); Goldberg & Zipursky, *Moral Luck*, *supra* note 1, at 1138-39 (same).

ment of one person by another, and without injury to a particular victim, there is no mistreatment.

Although Goldberg and Zipursky insist on injury as an element of wrongdoing, they do not insist on loss.¹⁵ Injury is a broader idea than loss: a victim may be injured without suffering a loss, as long as there is some impact that ties the wrong to the victim. For example, a harmless trespass to the victim's land or a false imprisonment with no lasting effect counts as an injury. Thus, although a tortious wrong is a wrong realized in an injury, recourse for wrongs does not collapse into allocation or rectification of losses.

A related feature of tortious wrongs, as distinct from moral wrongs, is that they are not tied to culpability. The lack of identity between wrongfulness and blameworthiness manifests itself in several ways. First, tort liability depends on what Goldberg and Zipursky refer to as bad "causal luck."¹⁶ Because tortious wrongdoing requires injury to an identifiable victim, a bad act with no impact is not a wrong. A careless driver who hits someone is liable, but a careless driver who misses is not. Similarly, when injury occurs, the victim's right of recourse is normally calibrated to the consequences of the wrong rather than the blameworthiness of the act. A careless driver who hits a telephone pole pays significantly less than a similarly careless driver who hits another car and physically injures a person. Second, tort liability is not excused by bad "compliance luck."¹⁷ Standards of tortious wrongdoing typically are objective, without allowance for lack of awareness or other difficulties that may have prevented the wrongdoer from conforming to the objective legal norm. An actor who makes an inadvertent mistake or who tries but fails to make a reasonable assessment of risk is nevertheless responsible in tort for injuries that result. The role of luck in morality is, at best, an open question.¹⁸ In tort, the role of luck is undeniable.

In their discussion of causal luck and compliance luck, Goldberg and Zipursky correctly isolate the distinctive, and problematic, fea-

15. See Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 1, at 954 (distinguishing injury from loss).

16. Goldberg & Zipursky, *Moral Luck*, *supra* note 1, at 1132-43.

17. *Id.* at 1143-49.

18. Goldberg and Zipursky believe that common intuition supports a luck-based notion of responsibility, at least in the context of an injury victim's claim against the injurer. See *id.* at 1128-31; Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 1, at 941-45; see also Thomas Nagel, *Moral Luck*, in *MORTAL QUESTIONS* 3, 24-38 (1979); Bernard Williams, *Moral Luck*, in *MORAL LUCK: PHILOSOPHICAL PAPERS 1973-80*, at 20, 20-39 (1981). My own intuition is to the contrary. For arguments in opposition to moral luck, see, for example, Larry A. Alexander, *Causation and Corrective Justice: Does Tort Law Make Sense?*, 6 *LAW & PHIL.* 1, 12-17 (1987), Christopher H. Schroeder, *Causation, Compensation, and Moral Responsibility*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 347, 361 (David G. Owen ed., 1995), and Jeremy Waldron, *Moments of Carelessness and Massive Loss*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW*, *supra* note 18, at 387, 387-89.

tures of tort law. A satisfactory theory of tort law as it stands requires an explanation of those cases in which the law establishes a rule of conduct and either (1) the defendant was not personally capable of controlling his conduct in conformity to the norm or (2) the defendant's liability exceeds the typical causal consequences of failure to conform to the norm.

The problem of luck is common to any theory that purports to link tort law to a principle of justice. Prominent corrective justice theories have either avoided the problem by appealing to convention to determine when losses are sufficiently wrongful to warrant correction or relied on a rather mysterious notion of internal morality. The challenge for Goldberg and Zipursky is to show that an interpretation of tort law as civil recourse against wrongs provides a better answer.

II. RECOURSE AND REVENGE

At the heart of civil recourse theory is the idea that victims have legitimate claims to recourse against wrongdoers. Goldberg and Zipursky stop noticeably short of saying that tort law is morally justified. Yet, they maintain that even in the morally problematic cases just described, in which the wrongdoer is not blameworthy or the sanction imposed on the wrongdoer is not proportional to the blameworthiness of his act, a victim of legal wrongdoing is entitled to react to the wrong and demand recourse.¹⁹ What makes the victim's claim legitimate, even in these cases, is that the wrongdoer has violated an established norm of conduct—a norm governing how members of society can permissibly treat one another.²⁰ When norm violation produces injury, victims feel mistreated and rightly seek to respond.²¹

Goldberg and Zipursky also maintain that the state has reason to support victims' demand for recourse through the institution of tort law. A state that recognizes the dignity and equality of individual citizens will provide the means for those who have been wronged to obtain recourse from those who have wronged them.²² Moreover, the

19. See Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 1, at 919, 943-44, 951 (referring to victims' entitlement to recourse for legal wrongs); Goldberg & Zipursky, *Moral Luck*, *supra* note 1, at 1162 (maintaining that victims in these cases "have been injured in a way that warrants their thinking that someone else is responsible for mistreating them and that their wrongdoer is an appropriate person from whom to demand redress or satisfaction").

20. See Goldberg & Zipursky, *Moral Luck*, *supra* note 1, at 1154-55 ("Negligence law sets standards of how to do right by others [V]ictims of . . . norm violations are likely to regard themselves as having been wronged and tend to have concomitant feelings of resentment and blame").

21. See *id.* at 1155 ("[T]he nature of the feeling is not simply affective and noncognitive; it is a feeling of having been victimized that goes along with recognition of a norm").

22. See Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 1, at 974 ("Part of the state's treating individuals with respect and respecting their equality . . . consists of its

state has reason to establish objective norms of care toward others—norms that require “*success* rather than best efforts”²³—even if this means that liability will not always correspond to culpability. Simple and determinate norms of conduct, without the complication of excuses and standards of good faith, will send a clearer message to actors and society at large. When the state’s expectations about how citizens should treat one another are stated in clear terms that track common notions of what it means to be wronged, the public can understand more readily what is required, and rights will be more robust.²⁴ At the same time, Goldberg and Zipursky suggest that the state has reason *not* to endorse a more draconian norm of absolute noninjury.²⁵ A no-fault standard of liability for all injuries attributable to the injurer’s agency is too onerous, too far afield from common moral intuition, and too intrusive on liberty to serve as an effective means of conduct regulation.

In their defense of tort law as civil recourse, Goldberg and Zipursky attempt to distance civil recourse from revenge by arguing that civil recourse rests on the firmer grounds of duty and entitlement.²⁶ At worst, civil recourse is rightful retaliation. But the distance they seek is not sustainable. Goldberg and Zipursky admit that a victim’s demand for recourse originates in feelings of blame and indignation.²⁷ They also assert that the objective of civil recourse is not to shift losses but to rectify wrongs.²⁸ But if recourse does not mean shifting the victim’s loss to the wrongdoer, it must mean imposing a new loss on the wrongdoer in return for harm done.²⁹ Imposing a loss in return for harm done, as an expression of blame and indignation, is the essence of revenge.³⁰ Thus, by sponsoring civil recourse,

being committed to empowering them to act against others who have wronged them.”).

23. Goldberg & Zipursky, *Moral Luck*, *supra* note 1, at 1157.

24. See *id.* at 1158-59 (explaining the value of determinate rules). This argument bears resemblance to the notion of acoustic separation: Courts may be able to regulate conduct more effectively when they state conduct rules in determinate terms and keep excusing conditions in the less-noticed background. The term “acoustic separation” was coined in Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984); see also LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW* 88-89 (2001). The obvious difference is that acoustic separation, although deceptive, leads to morally just outcomes. Objective standards of tort liability sacrifice morality in the interest of clarity.

25. See Goldberg & Zipursky, *Moral Luck*, *supra* note 1, at 1160 (opposing strict liability).

26. See Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 1, at 974.

27. Goldberg & Zipursky, *Moral Luck*, *supra* note 1, at 1154.

28. Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 1, at 954-57.

29. At points in their discussion, Goldberg and Zipursky appear to acknowledge the retaliatory character of civil recourse. For example, they refer, in support of civil recourse, to various social practices that facilitate “a response by the victim that involves isolating the norm-violator and subjecting such person to adverse treatment.” Goldberg & Zipursky, *Moral Luck*, *supra* note 1, at 1155.

30. For an effort to delineate the properties of revenge and distinguish revenge from retribution, see ROBERT NOZICK, *PHILOSOPHICAL EXAMINATIONS* 366-68 (1981).

the state provides injury victims with a controlled form of revenge. Moreover, Goldberg and Zipursky concede that the tort victim's entitlement to recourse is not a moral entitlement but a legal entitlement based on violation of norms that do not (or do not always) correspond to moral duty.³¹ Civil recourse, therefore, is not only revenge, but morally naked revenge. At the least, a defense of tort law as a law of recourse for wrongs needs to confront head-on this vengeful aspect of victims' demands for recourse.

Equating civil recourse with revenge does not necessarily establish that tort law is an outlet for vicious sentiments and therefore unworthy of state support. Appetites for revenge take a variety of forms, which range in their legitimacy.³² Vengeance is easiest to defend when the target of revenge has committed a moral wrong and the response is retributive in nature. Vengeance in the retributive sense is motivated by moral indignation—indignation against an act that violates moral constraints.³³ A retributive demand for recourse is impartial, made by or on behalf of the community as a whole, and the measure of recourse is fitted to the wrongdoer's moral desert. Arguably, retributive vengeance is a virtuous response that restores moral balance and defends human value.³⁴

Private vengeance by the victim of a moral wrong is not so virtuous, but it is possibly defensible. In her classic dialogue with Jeffrie Murphy on forgiveness, Jean Hampton described the sentiment that lies behind vengeance of this type as a feeling of resentment.³⁵ A moral wrong carries the suggestion that its victim is not of sufficient moral worth to be treated with care and respect; in this way it both demeans its victim and implies the superiority of the wrongdoer.³⁶ Resentment is the victim's desire to dispel this implication by inflicting harm on the wrongdoer. Murphy viewed resentment and desire for revenge in these circumstances as healthy, if not positively virtuous, because it reinforces the victim's self-respect. Hampton argued,

31. *Id.* at 947-53.

32. The following discussion relies substantially on work by Jean Hampton and Jeffrie Murphy. See generally JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* (1988).

33. This is Jean Hampton's interpretation. See Jean Hampton, *The Retributive Idea*, in *FORGIVENESS AND MERCY*, *supra* note 32, at 111, 143-57 (discussing moral indignation and moral hatred).

34. For varying defenses of retribution, see, for example, *id.* at 122-47 (explaining retribution in terms of human value), Michael S. Moore, *The Moral Worth of Retribution*, in *RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY* 179 (Ferdinand Schoeman ed., 1987) (explaining retribution in terms of moral desert), Herbert Morris, *Persons and Punishment*, 52 *MONIST* 475, 482-86 (1968) (explaining retribution on distributive grounds), and Jeffrie Murphy, *Hatred: A Qualified Defense*, in *FORGIVENESS AND MERCY*, *supra* note 32, at 88, 89 (explaining retribution in terms of moral balance).

35. Hampton, *supra* note 33, at 144-46. Murphy used the term "retributive hatred" to describe a similar sentiment. Murphy, *supra* note 34, at 89-95.

36. See Jean Hampton, *Forgiveness, Resentment and Hatred*, in *FORGIVENESS AND MERCY*, *supra* note 32, at 33, 44-45 (discussing the message expressed by moral wrongs).

to the contrary, that retaliation is futile, because bringing the wrongdoer down will not restore the victim's own position. Thus, in her view, resentment is not to be encouraged.

The problems raised by tort law are harder still. The challenge to a theory of tort law as recourse for wrongs lies in cases in which the wrongdoer is not blameworthy or liability is out of proportion to blameworthiness. When the victim has been injured, but the injurer is not morally blameworthy, the best that can be said is that the victim understandably resents a state of affairs in which he must suffer while the injurer continues unharmed. The attraction of recourse is not that it evens a moral score or that it dispels an implication of lesser moral worth, but that retaliation against the injurer equalizes the impact of the injurer's act. Accordingly, neither moral indignation nor reassertion of self-worth can explain the victim's pursuit of revenge. At the same time, a victim's resentment of a blameless injurer is not equivalent to envy or spite. Envy and spite are emotions that one person might feel toward another who has superior skills, better luck, or greater advantages in life. A desire to inflict harm that springs from emotions of this kind is unquestionably vicious. Desire to inflict retaliatory harm against a morally blameless injurer is not virtuous, but it is not purely spiteful and may be excusable.

A further difficulty for Goldberg and Zipursky is that if resentment of a blameless injurer is defensible at all, it should be equally defensible when legal liability is strict rather than fault-based. In either case, what triggers resentment is not the injurer's initial conduct toward the victim (which does not invite blame), but the injurer's failure to suffer its consequences. Goldberg and Zipursky, however, indicate that, in their view, no-fault liability is morally problematic and outside the purview of civil recourse.³⁷

Assuming that a victim's desire for recourse against a morally blameless injurer is not justified in itself, the next question is whether it gains legitimacy from the fact that recourse against the injurer enforces a legal right of the victim and a legal duty of the injurer. Perhaps, in these circumstances, the victim's demand for recourse for a legal wrongdoing can be characterized as expressing civic indignation, in response to a legally wrongful act. For several reasons, however, this argument is unpersuasive. First, civic indignation probably is not an accurate description of the attitude of the victim, who is pursuing recourse for himself rather than the community at large. Second, if the injurer was unable to conform to the governing norm or the victim's demand for recourse is out of proportion to the injurer's norm violation, civic indignation seems no more warranted than moral indignation.

37. Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 1, at 951-52.

Thus, norm violation adds nothing to the legitimacy of the victim's demand. The only feature of the situation that might plausibly warrant resentment is the violator's continued comfort, while the victim suffers without recourse. For the reasons given above, resentment based on a comparison of outcomes following a morally blameless act is hard to defend.

Goldberg and Zipursky add one more argument to the mix, asserting that the state is justified in establishing objective standards of liability that depart from standards of moral responsibility.³⁸ Objective standards send clear messages, and clear messages guide conduct effectively and reinforce individual rights. But this argument, too, fails to justify the tort victim's demand for recourse against a blameless wrongdoer. Goldberg and Zipursky offer a sensible argument for the state's choice of substantive tort rules, but they do not explain why the state's pragmatic reasons for establishing determinate norms of conduct should also count as reasons for individual victims to feel indignation toward, and retaliate against, morally blameless transgressors. From the victim's perspective, the relevant moral question is not what norms will most effectively guide conduct, but what acts justify a personal demand for recourse. Further, if victim retaliation is not warranted from the victim's perspective, then, from the perspective of the state, this negative aspect of tort law must be weighed against whatever contributions tort law makes to conduct regulation. Perhaps the state needs victims, and their unjustified resentments, to enforce its standards of conduct; but this need does not establish the overall desirability of tort law.

In any event, I do not think Goldberg and Zipursky want to rest their case for tort law on effective conduct regulations. Their project, as I understand it, is to develop a principled explanation of tort law that will rationalize, unify, and possibly justify the field. Promulgating and enforcing clear rules of conduct may be good policy, but they do not yield a principled theory of tort.

In sum, I see possible two weaknesses in the arguments Goldberg and Zipursky present in favor of civil recourse. First, they fail to confront the vengeful nature of victim's demand for recourse. At least in some cases, the attitudes that drive tort claims are difficult to defend. Second, Goldberg and Zipursky rest their defense of tort claims against morally blameless wrongdoers on the state's reasons for creating objective standards of conduct: demands for recourse are legitimate because they are based on rights, and rights against nonculpable wrongdoing are legitimate because the state has reason to regulate conduct through determinate rules. In my view, this reasoning is faulty: the fact that the state may be justified in its choice of conduct

38. Goldberg & Zipursky, *Moral Luck*, *supra* note 1, at 1157-59.

rules does not justify individual victims in demanding recourse (or seeking revenge) against individuals who fail without fault to conform to the rules.

III. INTERPRETATION

The quest for a unified theory of tort law also raises questions of methodology. In developing their theory of civil recourse, Goldberg and Zipursky appear to be following the path marked by Jules Coleman, who characterizes his theoretical project as *interpretation* of the contents and practice of tort law.³⁹ This approach to tort theory is structurally similar to the interpretive method of adjudication defended by Ronald Dworkin.⁴⁰ According to Dworkin, a judge faced with a legal dispute surveys past decisions in similar cases and extracts from those decisions the morally best principle capable of explaining most of the outcomes.⁴¹ The resulting principle provides the judge with a correct legal answer to the case at hand.

Interpretation of a field of law such as tort employs a similar method to reveal the principles underlying a field of positive law such as tort. In effect, the project is one of principle-based taxonomy: given the procedural structure, conditions for recovery, and available remedies in tort cases, what principles best explain tort as a category of law? The interpretive project undertaken by Goldberg and Zipursky is particularly rigorous because it aims to identify a single unifying principle to explain the field of tort.⁴²

There are a number of ways in which one might think about categories of law.⁴³ One approach is simply organizational: the objective is to locate a particular field of law within a larger classificatory scheme.⁴⁴ The taxonomer begins with conventionally recognized legal

39. COLEMAN, *supra* note 4, at 433 ("My conception of corrective [justice] is an interpretation, or a way of understanding, a prevalent social practice."). The analysis of tort law offered by Goldberg and Zipursky follows the interpretive pattern: they begin by establishing that tort law can plausibly be explained by a principle of civil recourse for wrongs, then proceed to an argument for the normative merit of a principle of civil recourse for wrongs. See Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 1, at 918-20.

40. RONALD DWORKIN, *LAW'S EMPIRE* 228-32, 240-50, 254-58 (1986) [hereinafter DWORKIN, *EMPIRE*]; RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 22-31 (1978). For further description and criticism of Dworkin's approach to adjudication, see LARRY ALEXANDER & EMILY SHERWIN, *DEMISTIFYING LEGAL REASONING* 88-103 (2008).

41. DWORKIN, *EMPIRE*, *supra* note 40, at 255-56.

42. See, e.g., Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 1, at 918 ("The law of torts is a law of wrongs and recourse . . ."). Coleman, in contrast, is content to identify a principle at work in substantial portions of tort law. See COLEMAN, *supra* note 4, at 434 (acknowledging that tort law is not based solely on corrective justice).

43. For a general analysis of methods of legal classification, see Emily Sherwin, *Legal Taxonomy*, 15 *LEGAL THEORY* 25 (2009).

44. This type of legal taxonomy is sometimes referred to as formal taxonomy (usually by critics). See Peter Jaffey, *Classification and Unjust Enrichment*, 67 *MOD. L. REV.* 1012, 1015-17 (2004). The term "formal," however, may lead to confusion with Ernest Weinrib's

categories and sorts them according to a set of taxonomical rules. For example, the applicable rules might require that all legal materials must be accounted for, that legal categories must not overlap, and that categories and subcategories must be ranged hierarchically such that each subcategory belongs to one and only one larger category.⁴⁵ In a project of this kind, the taxonomer does not attribute meaning to legal categories: categories such as tort law are simply historical facts, taken at face value and displayed in an orderly way. The resulting classification has no direct normative implications for legal decisionmaking; its purpose is simply to make law accessible. A classification of this kind may facilitate further explanation or evaluation of particular categories of law, but these are independent projects, not entailed in the classification itself.

Another approach to categories of law is functional. Here, the theorist attempts to identify the social purposes served by different categories of law. Tort law, for example, might promote efficient use and allocation of resources, promote safety by deterring dangerous acts, provide insurance against unexpected loss, spread losses in a manner that is distributively fair, or promote social peace by channeling appetites for revenge. The project may be primarily a positive one, in which the theorist observes existing rules within a field and determines what ends the rules were intended to serve, or serve in fact.⁴⁶ Alternatively, it may be a normative project, in which the theorist evaluates the capacity of existing rules to serve some perceived social need and proposes reforms designed to improve the rules' performance.⁴⁷ Classification of law into functional categories is not essential to this type of undertaking, but it may be helpful if different types of disputes implicate different social problems or different types of solutions.

Another mode of analysis is a "formalist" approach of the type developed by Ernest Weinrib.⁴⁸ Weinrib believes that both the explanation and the justification of a field of law such as tort can be found in the internal characteristics of the field—its adjudicatory structure, the rhetoric its practitioners employ, and the types of reasons offered

theory of tort, which discerns an internal form or essence in the law of torts. *See infra* text accompanying note 63. Therefore, I use the term "organizational" to describe projects of this kind.

45. An example that comes close to this is the work of Peter Birks, late Regius professor at Oxford. *E.g.*, Peter Birks, *Introduction to 1 ENGLISH PRIVATE LAW* xxxv, xxxv-xliii (Peter Birks ed., 2000).

46. An example is LANDES & POSNER, *supra* note 3, at 8-9 (describing their project as a positive theory of tort law); *but cf.* Jules L. Coleman, *The Structure of Tort Law*, 97 YALE L.J. 1233, 1235-37 (characterizing the analysis offered by Landes and Posner as both positive and normative).

47. An example is CALABRESI, *supra* note 3.

48. *See* ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995).

by decision-makers.⁴⁹ The theorist's task is to determine the "self-understanding" of the field,⁵⁰ which, if correctly identified, will possess its own "immanent moral rationality."⁵¹ On this view, the sole purpose of legal theory is to explain a field of law in terms of its own internal coherence; external evaluation is unnecessary and unwarranted.⁵²

The interpretive method I have attributed to Goldberg and Zipursky differs from any of the approaches just described. Its ambitions are not merely organizational: it is designed to yield a principled explanation of a field of law, an explanation that gives meaning to the field. At the same time, it does not assume that legal categories are intrinsically justified, based on their own foundational principles.⁵³ Interpretation is a normative process, concerned with the social functions and moral legitimacy of a field of law; but, it is not purely normative: it is normative analysis constrained by positive law and legal practice. As Coleman has described it, an interpretive theory of tort law seeks to identify principles that are both inherent in the practice and able to "withstand the test of rational reflection."⁵⁴ The purposes of interpretation in this sense are to theorize a field of law, to bring errant rules into line with the principle that motivates the field, and perhaps to justify the state's continued sponsorship of the legal claims that typify the field.

Despite its initial appeal, interpretive legal theory carries two significant dangers: the elasticity of the dimension of fit and the sub-

49. *Id.* at 1-46.

50. *Id.* at 14-16.

51. *Id.* at 23 (quoting Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 571 (1983)).

52. *Id.* at 3-6 (arguing that examination of the purposes of private law is beside the point).

53. See Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 1, at 972 (disavowing "starkly formalist jurisprudence").

54. COLEMAN, *supra* note 4, at 7. Coleman states that "the theorist immerses herself in the practice [of tort law] and asks if it can be usefully organized in ways that reflect a commitment to one or more plausible principles." *Id.* at 8. Plausible principles are principles worthy of "reflective acceptance." *Id.*

At least at one time, Coleman made the additional claim that the identification of principles inherent in a field such as tort is a logical process. Different types of legal rights have a different "syntax," from which deductive conclusions can be drawn. *Id.* at 299; Coleman, *supra* note 46, at 1249. The syntax of rights of recovery in tort—victims claim compensation against injurers for wrongful loss—establishes a connection between the victim's claim and the injurer's conduct that is "fundamental and analytic, not tenuous or contingent." Coleman, *supra* note 46, at 1249. This connection defines and verifies the dominant principle of tort law, which in Coleman's view is a principle of corrective justice.

I am not persuaded that principles can be derived logically from the structure and contents of a field of law. Tort law is the product of countless decisions by fallible human decision-makers. Contradictions within the law and practice of tort are inevitable, as different decision-makers follow logically irreconcilable paths. As a result, it is hard to see how general propositions about tort law can be proved deductively. It might be possible to eliminate contradictions by disregarding some aspects of doctrine and practice (as a Dworkinian interpretive method seems to allow). At best, however, the result would be a deductively valid conclusion about tort law, given certain premises that are not true. Such a conclusion is pointless.

moral character of the principles it yields.⁵⁵ Beginning with fit, Goldberg and Zipursky argue persuasively that the principle of recourse for wrongs conforms closely to the structure and contents of tort law. Descriptively, recourse for wrongs does considerably better than corrective justice as a theory of tort law: corrective justice fails to explain recovery by claimants who have suffered no measurable loss, undercompensatory and overcompensatory measures of recovery, rules denying recovery for fear without proof of injury, rules that turn on agency rather than loss, and rules that limit recovery to direct victims of wrongdoing.⁵⁶ Yet, although a wrong-based theory does better by the criterion of fit, the fit is not perfect. In particular, Goldberg and Zipursky are forced to concede that strict liability for the effects of extrahazardous activities is not wrong-based liability; their solution is to dismiss this feature of tort as peripheral.⁵⁷ Gain-based remedies for claimants who have not been injured also present a descriptive challenge.⁵⁸

Discrepancies of this kind raise doubts about the extent to which the process of interpreting a body of law is really constrained by law. One difficulty is that, assuming it is fair to set aside as peripheral some fraction of doctrinal material that conflicts with a proposed principle, there is no line marking how much material can be set aside without disqualifying the principle: there is no way to gauge when a principle that explains some but not all of tort law is too poor a match to count as a principle of tort law. Another difficulty is that the theorist can easily adjust the principle itself to accommodate problems of fit: rather than recourse for wrongs, the principle underlying tort law might be “recourse for wrongs with certain exceptions.”⁵⁹ Goldberg and Zipursky deserve credit for the care they have taken to maintain descriptive accuracy and limit the influence of their own normative preferences. But the interpretative method they employ is inherently manipulable. It provides no assurance that the principle it identifies is actually embodied in the field of law.

The more serious difficulty with interpretation is the nature of the principle that results. Identifying the principles inherent in a field of law should not be confused with the process of reasoning to reflective equilibrium.⁶⁰ Reasoning to reflective equilibrium begins with the

55. For further discussion of these points, see ALEXANDER & SHERWIN, *supra* note 40, at 95-100.

56. See Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 1, at 953-71 (detailing the descriptive failings of corrective justice and other loss-oriented tort theories).

57. *Id.* at 951-52.

58. See generally RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT ch. 5, topic 1, intro. note (Tentative Draft No. 4, 2005).

59. See ALEXANDER & SHERWIN, *supra* note 40, at 96-97.

60. See *id.* at 93-94 (explaining the difference between analogical reasoning from precedents and moral reasoning to reflective equilibrium). On reflective equilibrium, see

reasoner's best moral intuitions, proceeds to a tentative principle that roughly captures those intuitions, looks for discrepancies between intuition and principle, and then adjusts both the initial intuitions and the tentative principle to achieve the best possible accommodation. In contrast, interpretation as a method of legal theory is based on law, not moral intuition. The reasoner begins with data drawn from past precedents and prevailing procedure, then searches for a principle that fits this data. The data cannot be altered, as moral intuitions can be altered in the process of reasoning to reflective equilibrium. Some of the data can be discarded as atypical or seriously wrong; but, because the resulting principle is supposed to be a principle inherent in, and constrained by, law, at least some data—including data that the reasoner believes to be mistaken—must be retained. The result is not the best possible principle, but the best principle that fits the imperfect background of positive law.⁶¹

It follows that the method of interpretation does not guarantee that the principle it yields is a good one. Because the theorist's task is to create the normatively best principle that explains most features of a body of law, interpretation carries an implication of justification. Yet, for the reasons just given, a principle produced by interpretation has no real justificatory force. If actual tort law exerts any constraint on the process, the starting point is a flawed set of data and the conclusion is nothing more than the best principle consistent with that flawed data. Civil recourse theory is a case in point: recourse for wrongs may be the best principle capable of explaining tort law, but the discussion of revenge in the previous section of this essay suggests that it provides little if any normative support for the institution of tort law. Probably the best normative argument that can be made on behalf of civil recourse is a vaguely Burkean claim that the tort system has succeeded over time in preserving civil peace; but again, Goldberg and Zipursky are unlikely to be satisfied with an argument of this kind.

generally JOHN RAWLS, *A THEORY OF JUSTICE* 14-21, 42-53, 578-82 (1971), Norman Daniels, *Wide Reflective Equilibrium and Theory Acceptance*, 76 J. PHIL. 256 (1979), and Howard Klepper, *Justification and Methodology in Practical Ethics*, 26 METAPHILOSOPHY 201, 205-06 (1995).

Goldberg and Zipursky allude at one point in their argument to "Rawlsian reflective equilibrium." Goldberg & Zipursky, *Moral Luck*, *supra* note 1, at 1164. They do not make the mistake described in the text: their point is that the principle of civil recourse against wrongs conforms to common *moral* intuitions about luck and responsibility, as reflected not only in law but in social practices. See Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 1, at 941-45 (discussing intuitions about causal luck). Nevertheless, the connection they make to reflective equilibrium seems inapt: common intuitions reflected in social practice are not the reasoner's own best moral intuitions, and they are not subject to adjustment in the manner that moral intuitions are subject to adjustment in the process of reasoning to reflective equilibrium.

61. See ALEXANDER & SHERWIN, *supra* note 40, at 99.

More generally, it is not clear why tort law should be susceptible to principled explanation, much less principled justification. Tort law is not a natural phenomenon that might be expected to conform to a single motivating principle, or even a coherent set of principles; rather, it is a human artifact, produced by many decision-makers over a long period of time. Perhaps more than any other field of law, it is an amalgamation of ad hoc rules, with origins in the quirks of early common law procedure.⁶² Moreover, the boundaries that divide “tort” law from contract law or property law are conventional and often arbitrary: no principle requires that an action of ejectment be treated as a property case rather than a tort case. It is possible that an invisible hand may have guided the mass of decisions that constitute tort law toward the realization of certain social goods. Beyond this, however, there is no reason to think that the relationship among the rules of tort should be principled rather than conventional, or that theorists should be able, with sufficient effort, to discover an essence of tort. In other words, there is no reason to think that tort law is a composite whole rather than a rationally inexplicable heap.⁶³

IV. CONCLUSION

Goldberg and Zipursky show that theories of loss allocation, including theories based on the principle of corrective justice, fail to explain significant features of tort law. They present a persuasive case that tort law gives parties who have been injured by others’ legal wrongs rights of recourse against their wrongdoers. Ultimately, however, they do not show why there is such an entitlement or why there should be such an entitlement. The most plausible answer to the question why there is such an entitlement is that victims desire revenge and the legal system affords them a limited means for seek-

62. See Bernard Rudden, *Tortiousness*, 6/7 TUL. CIV. L.F. 105 (1991-1992) (arguing that tort law cannot usefully be generalized). Rudden presents an alphabetical listing of torts. His explanation for this choice of methodology is that:

[T]he alphabet is virtually the only instrument of intellectual order of which the common law makes use. Innocent of any sense of a *Reschordnung*, and suspicious of formal reasoning, the common law is happiest with techniques which, as Weber saw, “are not ‘general concepts’ which would be formed by abstraction from concreteness or by logical interpretation of meaning or by generalisation and subsumption; nor [are] these concepts apt to be used in syllogistically applicable [n]orms.” A striking instance of the common law’s hostility to abstract order is found in the way in which almost all of the few American states which did adopt civil codes have since split up their provisions and arranged them alphabetically

Id. at 110 (second alternation in original) (citations omitted) (quoting MAX WEBER, *MAX WEBER ON LAW IN ECONOMY AND SOCIETY* 201-02 (Max Rheinstein ed., 1954)).

63. Weinrib might say that a legal system naturally values its own internal coherence, but I view the legal system as a looser kind of entity than Weinrib takes it to be. See WEINRIB, *supra* note 48, at 29-33 (discussing coherence).

ing revenge. The most plausible answer to the question why there should be such an entitlement is that the system must accommodate this desire, to avoid being overridden by private parties and to maintain the allegiance of its subjects. Maybe the system should resist these pressures; maybe it should not. In any event, the method of interpretation, which yields recourse for wrongs as the best principle capable of explaining the practice and contents of tort law, contributes nothing to the needed justification of recovery in tort.